A

ANTAH SCHINDLER SDN BHD

v.

SSANGYONG ENGINEERING & CONSTRUCTION CO LTD

B

COURT OF APPEAL, PUTRAJAYA
MOKHTAR SIDIN JCA
SURIYADI HALIM OMAR JCA
ZAINUN ALI JCA
C [CIVIL APPEAL NO: W-02-474-2003]
3 MARCH 2008

CONTRACT: *Building contract - Claim for work done - 'Pay when paid' clause - Contract for installation of lifts in building - Works*
D *completed by sub-contractor and certified by architect's certificate - Claim for payment by sub-contractor against main contractor - Whether main contractor only liable to pay sub-contractor upon receiving payment from employer - Whether 'pay when paid' clause merely imposes a time limit for payment - Whether 'pay when paid' clause imposes any restriction*
E *over sub-contractor's rights to claim for payment against main contractor*

CIVIL PROCEDURE: *Summary judgment - Triable issues - Whether any substantial dispute of facts or law - Whether 'pay when paid' clause in contract for installation of lifts in building denied sub-contractor of right*
F *to sue for a judgment sum - Whether triable issue*

CIVIL PROCEDURE: *Summary judgment - Leave to sign judgment - Whether court can lay down terms on issue of enforceability of summary judgment*

G The plaintiff was a sub-contractor whilst the respondent defendant was the main contractor. The latter was appointed by Yetcome Investment ("the employer"), to install lifts in respect of the Menara Landmark Johor Bahru Project. The plaintiff carried out its part of the bargain. In relation to this, interim certificates
H numbered 332, 333, 343 and 344 as certified by the project architect, were promptly partially paid except a balance sum of RM1,219,104. The balance unpaid sum came from certificates 332, 333 and 343. The plaintiff submitted that the payments were to be made within 14 days of the architect's certificate. The
I defendant however claimed that apart from the sub-contract, the main contract with the employer was also incorporated in the contractual relationship between them. The defendant therefore

claimed that it was mutually agreed and understood that payments to the plaintiff would be made after the defendant had received payments from the employer. The defendant submitted that the format of payment must be as that provided for in cl. 27(a)(vii) of the main contract, read together with cl. 19(2) of the nominated sub-contractors (special condition of the said sub-contract). In other words, according to the defendant, the sub-contract had proceeded on a "pay when paid" basis. The plaintiff had applied for summary judgment of its claim and the senior assistant registrar had refused the application on the premise that it was not a straightforward case. The plaintiff then successfully appealed to the judge-in-chambers but was however dissatisfied with the judgment as it contained conditional terms within it. The plaintiff then appealed to the Court of Appeal.

Held (allowing the appeal with costs)
Per Suriyadi Halim Omar JCA:

(1) The assertion by the defendant that it had yet to be paid by the employer was suspect. Certificate 344 was a late comer but yet it had been fully paid up. Certificates 333 and 343 had been partially paid. (para 14)

(2) The issue of "pay when paid" as being triable was a non-starter as there was sufficient evidence in the circumstances of the case, to confirm that requirement. The plaintiff had acquiesced to the terms of 'pay when paid'. The 41 transactions from 1996 to 2000, where the plaintiff was never paid within 14 days of receipt of the architect's certificates, and payment only made after the employer had paid the defendant, stood testimony of that acquiescence. The basis of the above "pay when paid" from which acquiescence flowed was cl. 27(a)(vii). (para 15)

(3) By the very language alluded to in the relevant provisions of the current main contract and sub-contract, read together with cl. 27(a)(vii), the latter was a mere provision imposing a time limit for payment. There was no express provision mounted into it which imposed any restriction over the rights of the plaintiff to pursue its claim against the defendant. Since it was not unambiguously expressed in cl. 27(a)(vii) that the plaintiff was to be denied its rights from pursuing the claim in the current format, this action was procedurally correct. (paras 16 & 17)

(4) There was no substantial question left to be tried, be they dispute of facts or law, which could deny the plaintiff of its right to sue for a judgment sum. (para 22)

(5) Whether the order would be enforced or not subsequently was of no consequence to the court. It was not for the court to lay down unnecessary terms on the issue of enforceability. (para 23)

Bahasa Malaysia *Translation Of Headnotes*

Plaintif adalah seorang sub-kontraktor sementara responden/defendan adalah kontraktor utama. Pihak terkemudian telah dilantik oleh Yetcome Investment ("majikan") untuk memasang lif di Projek Menara Landmark Johor Bahru. Plaintif telah menyiapkan kerja-kerjanya di bawah kontrak. Sehubungan itu, sijil-sijil interim nombor 332, 333, 343 dan 344 seperti yang disahkan oleh arkitek projek, telah dibayar sebahagiannya kecuali bakinya sebanyak RM1,219,104. Baki yang belum dibayar tersebut datang dari sijil-sijil 332, 333 and 343. Plaintif berhujah bahawa pembayarannya harus dibuat dalam masa 14 hari dari sijil arkitek. Defendan bagaimanapun mendakwa bahawa selain dari Sub-Kontrak, Kontrak Utama dengan Majikan juga menjadi faktor dalam hubungan kontraktual mereka. Defendan dengan itu mendakwa adalah menjadi persetujuan dan persefahaman bersama mereka bahawa pembayaran kepada plaintif akan dibuat selepas defendan sendiri menerima pembayarannya dari majikan. Defendan berhujah bahawa format pembayaran adalah seperti yang diperuntuk oleh fasal 27(a)(vii) Kontrak Utama dibaca bersekali dengan fasal 19(2) sub-kontraktor dinamakan (syarat khas sub-kontrak tersebut). Dengan lain perkataan, menurut defendan, sub-kontrak adalah dilaksanakan di atas dasar "bayar bila dibayar". Plaintif memohon penghakiman terus bagi tuntutannya tetapi permohonan ditolak oleh Penolong Kanan Pendaftar atas alasan ia bukan suatu kes yang jelas dan terang. Plaintif dengan jayanya merayu kepada hakim-dalam-kamar, namun tidak berpuas hati dengan beberapa syarat yang dikenakan dalam penghakiman tersebut. Oleh itu plaintif merayu kepada Mahkamah Rayuan.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Suriyadi Halim Omar HMR:

(1) Pengataan defendan bahawa ia masih belum dibayar oleh Majikan adalah dicurigai. Sijil 344 datang lewat namun ia telah dibayar sepenuhnya. Sijil-sijil 333 dan 343 telah dibayar sebahagiannya.

(2) Isu "bayar bila dibayar" sebagai boleh dibicarakan adalah satu non-starter kerana terdapat keterangan mencukupi dalam halkeadaan kes bagi mengesahkan syarat tersebut. Plaintif telah akur kepada terma "bayar bila dibayar". Kewujudan 41 transaksi dari tahun 1996 hingga 2000, di mana plaintif tidak pernah dibayar dalam masa 14 hari penerimaan sijil arkitek, dan bayaran hanya dibuat selepas Majikan membayar kepada defendan, adalah bukti keakuran ini. Asas bagi "bayar bila dibayar" ini yang mencetuskan keakuran plaintif adalah fasal 27(a)(vii).

(3) Mengambilkira perbahasaan di dalam peruntukan-peruntukan relevan kontrak utama dan sub-kontrak, dibaca bersama dengan fasal 27(a)(vii), yang terkemudian tersebut hanyalah peruntukan yang mengenakan had masa bagi pembayaran. Tiada peruntukan ekspres dimasukkan di dalamnya yang menidakkan hak plaintif untuk membuat tuntutan terhadap defendan. Oleh kerana fasal 27(a)(vii) tidak menyatakan secara terus terang bahawa plaintif dihalang dari membuat tuntutan di dalam format semasa di sini, maka tindakan di sini dari segi prosedurnya adalah betul.

(4) Tiada soalan penting yang boleh dibicarakan, sama ada yang berbentuk pertikaian fakta atau undang-undang, yang boleh menidakkan hak plaintif untuk menuntut dan mendapatkan suatu jumlah penghakiman.

(5) Sama ada perintah harus kemudiannya dikuatkuasakan ataupun tidak adalah tidak penting kepada mahkamah. Bukanlah tugas mahkamah untuk menyenaraikan terma-terma yang tidak perlu berkaitan isu penguatkuasaan.

Case(s) referred to:

Alloy Automotive Sdn Bhd v. Perusahaan Ironfield Sdn Bhd [1986] 1 CLJ 2; [1986] CLJ (Rep) 45 SC ***(refd)***

Durabella Ltd v. J Jarvis & Sons Ltd 83 Con LR 145 ***(refd)***

Malayan Insurance (M) Sdn Bhd v. Asia Hotel Sdn Bhd [1987] 1 CLJ 246; [1987] CLJ (Rep) 182 SC ***(refd)***

Royden (M) Sdn Bhd v. Sykt Pembenaan Yeoh Tiong Lay Sdn Bhd [1991] 3 CLJ 2935; [1991] 3 CLJ (Rep) 670 HC ***(dist)***

Smith & Smith Glass Ltd v. Winstone Architectural Cladding Systems Ltd [1992] 2 NZLR 473 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 14

For the appellant - Lim Chong Fong (Marion Qua with him); M/s Azman Davidson & Co
For the respondent - T Kuhendran (Khairiyah Yaman with him); M/s Zul Rafique & Partners

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S1(S7)-22-343-01]

Reported by Amutha Suppayah

JUDGMENT

Suriyadi Halim Omar JCA:

[1] On 26 March 2007 the panel had allowed the appeal filed by the appellant plaintiff (hereinafter referred to as the plaintiff) with costs at the Court of Appeal level and below. This was a matter pursuant to O. 14 of the Rules of the High Court 1980 which was initially heard by the senior assistant registrar. The latter had refused the application, on the premise that it was not such a straight forward case, leading subsequently to a successful appeal being filed before the judge-in-chambers. Regretfully the High Court judge had made an order, which had dissatisfied the successful plaintiff, in that it contained conditional terms within it.

[2] To appreciate the reasons why we allowed this appeal, by necessity, we need to lay down some of the salient facts. The plaintiff was a sub-contractor whilst the respondent defendant (hereinafter referred to as the defendant) the main contractor.

[3] The latter was appointed by Yetcome Investment, hereinafter referred to as the employer, to install lifts in respect of the Menara Landmark Johor Bahru Project. The plaintiff then had dutifully carried out its part of the bargain. In relation to this case, founded on interim certificates numbered 332 (dated 15 July 1998), 333 (dated 16 August 1998), 343 (dated 25 January 2000) and 344 (dated 19 December 2000) as certified by the project architect, were promptly partially paid except a balance sum of RM1,219,104. The balance unpaid sum came from certificates 332, 333 and 343.

[4] In relation to any payment, the plaintiff had submitted that the contractor shall apply for the architect's certificates and payments made from those certificates, which inevitably represent the total value of work done by the plaintiff, to be paid forthwith within 14 days. According to the plaintiff, this term was pursuant to cl. 11(b) of the sub-contract agreement and it reads:

> (b) Within fourteen days of the receipt by the Contractor of any certificate or duplicate copy thereof from the Architect the Contractor shall notify and pay to the Sub-Contractor the total value certified therein in respect of the Sub-Contract Works and in respect of any authorized variations thereof and in respect of any amounts ascertained under clause 8 (c) hereof less:
>
> (i) retention Money, that is to say the proportion attributable to the Sub-Contract Works of the amount retained by the Employer in accordance with the Main Contract; and
>
> (ii) the amounts previously paid.

[5] The defendant read their contractual relationship differently. Its defence was simple in that apart from the sub-contract, the main contract with the employer was also incorporated in the contractual relationship between them. It makes commercial sense for a main contractor to incorporate in sub-contracts condition precedents, in relation to its responsibility to pay the sub-contractor, in that payment is made only after payments have been received from the employer. How can the contractor not be concerned when the architect's certificate is conclusive as to the date and amount of payment? On the other hand sub-contractors too are not without strength. Backed by their respective strength, parties will thereafter conclude their discussions, with their intentions being crystallized into written agreements.

[6] As affirmed in its defence, since the commencement of the project in 1996, it was mutually agreed and understood that payments to the plaintiff would be made after the defendant had received payments from the employer. The defendant submitted that the format of payment must be as that provided for in cl. 27(a) (vii) of the main contract, read together with sub-cl. 2 of cl. 19 of the Nominated Sub-Contractors (Special Condition of the said Sub-Contract). Clause 27(a) (vii) reads:

That payment in respect of any work, materials or goods comprised in the sub-contract shall be made within 14 days after receipt by the Contractor of payment from the Employer against the architect's certificate under clause 30 of these Conditions which states as due in amount calculated by including the total value of such work, materials or goods, and shall when due be subject to the retention by the Contractor of the sums mentioned in sub-paragraph (viii) of paragraph (a) of this Condition.

[7] As such, in the event payments were not received from the employer, the defendant would not be obliged to make payment to the plaintiff. In other words, the sub-contract had proceeded on a "pay when paid" basis.

[8] The plaintiff had alleged that the denial of the expressed provision of cl. 11(b) of the sub-contract was repugnant to or inconsistent with their agreement. In support of that argument the case of *Royden (M) Sdn Bhd v. Sykt Pembenaan Yeoh Tiong Lay Sdn Bhd* [1991] 3 CLJ 2935; [1991] 3 CLJ (Rep) 670 was referred to. In this case the defendant was employed by Cosmopleks Sdn Bhd ('the employer') as the main contractor for the construction of a project, Raintree Terrace, comprising 12 units of luxury condominium apartments at Jalan Wickham, Kuala Lumpur ('the project). By two subcontract agreements entered between the plaintiff and the defendant, the latter appointed the former as a sub-contractor to supply and install air-conditioning and ventilation systems for the project, and to supply and install lift services for the project. The plaintiff had alleged that the defendant had failed or refused to pay certain progress payments, notwithstanding that such payments were duly certified by the authorized architect of the project, hence the institution of the civil suit on 11 February 1987. The plaintiff made an application for summary judgment which was heard by the senior assistant registrar on 7 November 1988 and final judgment was directed to be entered against the defendant. On appeal, the defendant raised two main issues, with the following being relevant for the current appeal: The defendant had alleged that it was not liable under cl. 27(a)(vii) of the main contract, entered between the defendant and the employer, read with the letter of the defendant confirming the appointment of the plaintiff as its sub-contractor, and certain clauses in the sub-contract to pay the amounts certified by the payment certificates 14, 18 and 20. The excuse was that it had yet to be paid by the employer. Clause 27(a)(vii) read:

> That payment in respect of any work, materials, or goods comprised in the sub-contract shall be made within 14 days after the receipt by the contractor from the employer of the amounts stated in any architect's certificate under cl 30 of these conditions which includes an amount due to the nominated sub-contractor under the sub-contract.

[9] Lim Beng Choon J after undertaking a fact finding exercise had found that cl. 27(a)(vii) was not expressly stated in the two sub-contracts. He found no privity of contract existing between the employer and the sub-contractor, and reading the sub-contract as a whole, it could not be said that cl. 27(a)(vii) of the main contract had been incorporated into and formed part of the sub-contract. The learned judge further opined that to incorporate cl. 27(a)(vii) of the main contract into the sub-contract would be repugnant to or inconsistent with the express provisions of cl. 11(b) of the subcontract which clearly required the main contractor to inform and pay the sub-contractor within 14 days upon receipt of the payment certificate issued by the architect. He accordingly dismissed the appeal.

[10] To counter this argument the defendant had referred to the sub-contract provisions and we reproduce the relevant ones beginning with provision 1. It reads:

> These Special Conditions of Sub-Contract are to be read in conjunction with the General Conditions of Sub-Contract which shall be the "Standard Form of Sub-Contract 1970 Edition" for use where the Sub-Contractor is nominated under the "Agreement and Schedule of Conditions of Building Contract for use in Malaysia, Private Edition (With Quantities) 1969 edition" issued under the sanction of the Pertubuhan Arkitek Malaysia and the Institution of Surveyors (Federation of Malaysia). Wherever these Special Conditions vary from the General Conditions the terms of the Special Conditions shall take precedence.

[11] The defendant had further advanced the argument that cl. 27 had specifically been referred to in the sub-contract unlike the position in *Royden (M) Sdn Bhd v. Sykt Pembenaan Yeoh Tiong Lay Sdn Bhd.* At SCC-19 (6) the Special Conditions of Sub-Contract read:

> (6) It is expressly agreed that the words "within fourteen days of receiving payment from the Employer against the Architect's certificate" shall be added after the words "the amount so certified" in line five of sub-clause 27(e) of the Conditions.

[12] Additionally there were the opening words of the sub-contract which read:

> The Sub-Contractor shall be deemed to have notice of all the provisions of the Special Conditions of the Main Contract which are as follows …

[13] Apart from these provisions was the provision in the sub-contract found at p. 354 of the rekod rayuan which states too that "This Special Condition supersedes the General Conditions of the Sub-Contract wherever applicable".

[14] Even though the legal arguments put forth by the defendant in relation to the construction of the main and sub-contract documents were strong, the assertion that it had yet to be paid by the employer was suspect. On scrutiny of the facts an erratic pattern of payment could be detected. Certificate 344 was a late comer but yet it had been fully paid up. Stranger still when we found that certificates 333 and 343 had been partially paid. If partial payments had been made could it not be implied that the employer had already made payments? If that were so why deny the plaintiff's rights of payment?

[15] Having sifted the submissions and the written agreements, we had decided that this issue of "pay when paid" as being triable was a non-starter as there was sufficient evidence in the circumstances of the case, to confirm that requirement. Evidentially as ventilated by the defendant the plaintiff had acquiesced to the terms of 'pay when paid'. The 41 transactions from 1996 to 2000, as gauged from the documents, where the plaintiff was never paid within 14 days of receipt of the architect's certificates, and payment only made after the employer had paid the defendant, stood testimony of that acquiescence. The basis of the above "pay when paid" from which acquiescence flowed was the above mentioned cl. 27(a)(vii). It was our view that the facts of this case were distinguishable to that of *Royden (M) Sdn Bhd v. Sykt Pembenaan* in that cl. 27(a)(vii) of the main contract here had been incorporated into the sub-contract. We were of the view that there was nothing triable or fearsome about this clause or its effect.

[16] By the very language alluded to in the relevant provisions of the current main contract and sub-contract, read together with cl. 27(a)(vii), we had construed the latter as a mere provision imposing a time limit for payment. We found no express provision

mounted into it which imposed any restriction over the rights of the plaintiff to pursue its claim against the defendant. Master Towle in *Smith & Smith Glass Ltd v. Winstone Architectural Cladding Systems Ltd* [1992] 2 NZLR 473 had occasion to state:

> While I accept that in certain cases it may be possible for persons contracting with each other in relation to a major building contract to include in their agreement clear and unambiguous conditions which have to be fulfilled before a subcontractor has the right to be paid, any such agreement would have to make it clear beyond doubt that the arrangement was to be conditional and not to be merely governing the time for payment. I believe that the *contra proferentem* principle would apply to such clauses and that he who seeks to rely upon such a clause to show that there was a condition precedent before liability to pay arose at all should show that the clauses relied upon contain no ambiguity.

[17] It was our view that, since it was not unambiguously expressed in cl. 27(a)(vii) that the plaintiff was to be denied its rights from pursuing the claim in the current format, this action was procedurally correct. We now discuss the merit of the appeal.

[18] From the above arguments and despite the production of a substantial amount of documents we were of the view that the case was straightforward and simple. We were satisfied, not unlike the High Court judge that the salient terms of the written contract had been agreed upon by both parties. The history of payments showed that parties had acceded to the mode of payment. On the other hand we disagreed that this "pay when paid" clause disallowed the plaintiff from pursuing this claim, on account of there being no bar preventing it. We also found, as the High Court judge did that there was no dispute as to the quantum, and to-date the sum claimed still remained unpaid.

[19] We disagreed with the High Court order only on the aspect of the summary judgment being granted subject to certain payment terms. Even the defendant had conceded that 'the order of the learned High Court judge was not quite proper". (To reiterate, we were of the view that although the amount claimed by the plaintiff was granted by the High Court, the specific prerequisite that payment be made enforceable only after the defendant had received payment from the above said employer, should not have been so ordered).

[20] The principles applied in a summary judgment proceedings is clearly illustrated in the case of *Alloy Automotive Sdn Bhd v. Perusahaan Ironfield Sdn Bhd* [1986] 1 CLJ 2; [1986] CLJ (Rep) 45 SC, where the Supreme Court had stated:

> Where all the issues are clear, summary judgment should be given. An appellant ought not to be shut out from defending unless it is very clear that he has no case in the action. A complete defence need not be shown. The defence setup need only show that there is a triable issue or question or that for some reason there ought to be a trial.

[21] Similar principles were further illustrated in the case of *Malayan Insurance (M) Sdn Bhd v. Asia Hotel Sdn Bhd* [1987] 1 CLJ 246; [1987] CLJ (Rep) 182 SC, where the Supreme Court had held as follows:

> ... the underlying philosophy in the Order 14 provision is to prevent a respondent clearly entitled to the money from being delayed his judgment where there is no fairly arguable defence to the claim. The provision should only be applied to cases where there is no reasonable doubt that the respondent is entitled to judgment. Order 14 is not intended to shut out an appellant. The jurisdiction should only be exercised in very clear cases.

[22] It was obvious here that there was no substantial question left to be tried, be they dispute of facts or law, which could deny the plaintiff of its right to sue for a judgment sum. With nothing left triable we had allowed the appeal as prayed for in prayer 1 of the summons-in-chambers. The plaintiff had wanted only final judgment for the sum of RM1, 219,104 minus the unwarranted terms.

[23] Whether the order would be enforced or not subsequently was of no consequence to us. Needless to say, on this issue of enforceability, it was not for the court to lay down unnecessary terms, let alone the plaintiff never sought any direction of "pay when paid". Surely any specific judicial direction in the order could unwittingly deprive the plaintiff of any statutory or common-law protection, and prevent the eventual recovery of the balance sum from the defendant, on account of the terms.

[24] Simply put, despite being faultless but pinned down by such inhibitive terms, the plaintiff's chances of recovering the balance by other alternative routes would face undue pressure and challenges. The fact that there was no cross-appeal on the judgment sum by

the defendant speaks volumes of its assumed safe position, unwittingly accorded to it. Having said that, and in *obiter*, no court of law would condone any act, activity or inactivity or unholy collusions deliberately set up to defeat the plaintiff's claim (*Durabella Ltd v. J Jarvis & Sons Ltd* 83 Con LR 145).

[25] To wind up this judgment, based on the above reasons, we had unanimously allowed the appeal with costs here and below. Order in terms was granted as per prayer 1 of the summons in chambers dated 27 August 2001.